81-2273

NO. _____

Office - Supreme Court, U.S.
FILED
JUN 2 1982
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RONALD CAMINITA,

Petitioner

versus

STATE OF LOUISIANA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Whether a superior may arbitrarily refuse to honor an offer of a plea bargain agreement made by a subordinate prosecutor with real or apparent authority, which was timely accepted by defendant, when such refusal implicates concepts of fundamental fairness protected by the Fourteenth Amendment's due process clause?

2. Whether such a refusal to honor an offer of a plea bargain also violates petitioner's right to effective assistance of counsel as protected by the Sixth Amendment?

PARTIES

Petitioner, Ronald Caminita, is a 17 year old resident of New Orleans, Louisiana, who was convicted of armed robbery of a fast food outlet in New Orleans.

Respondent, is the State of Louisiana.

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OPINIONS BELOW

The Opinion of the Supreme Court of Louisiana, not yet reported, appears in Appendix A-1 hereto. The Opinion of the Criminal District Court, Parish of Orleans, not published appears in Appendix A-2 hereto.

JURISDICTION

The Judgment of the Supreme Court of Louisiana was entered on March 1, 1982. Petitioner's Motion for Rehearing was denied on April 5, 1982. This petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

STATUTORY PROVISIONS INVOKED

United States Constitution, Amendment XIV, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Ronald Caminita, was arrested on October 21, 1979 at the home of his grandfather in Jefferson Parish, Louisiana. He was charged with the State crime of armed robbery of a retail fast food establishment. The appellant was tried and convicted on the 11th day of March 1980 by a jury and with the Honorable Rudolph F. Becker, III presiding.

Prior to this trial, on February 25, 1980 counsel for the petitioner met with Mr. David Plavinsky of the Orleans Parish District Attorney's office and Mr. Joe Meyers, Chief of Trials of the Orleans D.A. The meeting was by chance in a New Orleans restaurant, but because the two above-mentioned prosecutors were handling the Caminita case they raised the subject of that case to petitioner's counsel. The question of a plea bargain arose and all parties discussed a bargain to allow petitioner to plead guilty to a charge of simple robbery, which the prosecutors would recommend along with a fine and jail time. Attorney for petitioner accepted, pending a discussion with his client and believed that an agreement had been reached which would be finalized by prompt acceptance by his client. On the day following this meeting counsel for petitioner, after discussion with his client, attempted to finally accept the bargain by calling Mr. Meyers. After some delay in accepting counsel's calls Mr. Meyers communicated that the Orleans D.A. had rejected the agreement offered by Mr. Meyers and in effect failed to honor the plea agreement.

After the District Attorney formally refused to honor the agreement in open court, petitioner moved to quash, which motion after hearing, was denied. Petitioner was forced to trial, and the Louisiana Supreme Court refused Supervisory Writs on the plea question, finding instead adequate appellate remedies.

After conviction petitioner appealed the denial of the motion to quash along with the denial of a motion for new trial based upon a conviction contrary to the law and evidence. The Supreme Court of Louisiana affirmed the conviction.

While the record indicates some disagreement about the exact discussion that took place between counsel for petitioner and members of the District Attorney's office such disagreement is irrelevant. Both the district judge and the Supreme Court held that as a matter of law plea negotiations are not constitutionally protected, but only final plea agreements. (Appendix A-1 & A-2)

REASONS FOR GRANTING THE WRIT

I. The Rulings Below Conflict With Important Principles Articulated By This Court And Other Lower Courts.

Plea bargaining has become the mainstay of the American criminal justice system. Consequently, this Court has recently begun to legitimate, define and somewhat control the entire process, which it has called "an essential component of the administration of justice". *Santobello v. New York*, 404 U.S. 257, 260 (1971). *Santobello* also said that "the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, *must be attended by safeguards to insure the defendant what is reasonably due in the circumstances*". 404 U.S. at 262 (emphasis added). Proceeding from this principle, and grounding its decision upon constitutional concepts of "fairness" this court held that remedies would exist for unfulfilled prosecutorial promises even where the breach was "inadvertent", and despite the fact that the breach did not influence the judge on the subject matter of the agreement, *i. e.* sentencing.

The inexorable result of these *Santobello* principles was the analogy of plea bargaining to concepts of contract law. *See* Westin & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif.L.Rev. 471 (1978). Such analogies, however, have not always proved sufficient, and the important principles of *Santobello* are not adequately protected by mere contract analogies. This is especially true when the "breach" occurs *prior* to the consummation of the bargain, but at a stage and in a way that the fairness principles of *Santobello* are clearly implicated. *See Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979). *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1980); *Comm. of Pennsylvania v. Klobuchir*, 405 A.2d 881 (Penn. 1979); *State v. Johnson*, 596 P.2d 308 (Wash.App. 1979); and *Bullock v. State*, 397 N.E.2d 310 (Ind. 1979) (Shields, J., dissenting).

A. The Rulings Below Conflict With Due Process Principles Protecting The Plea Bargaining Process Through The Fourteenth Amendment.

The Fourth Circuit was the first to address the question of "breached" plea negotiations. That court drew upon *Santobello* to conclude that it must view such a "breach" in terms of constitutional fairness as protected by the Fifth (and Fourteenth) Amendment due process clause. The court did not reject the contract analogy, but only noted its limits and observed "that the temptation to take the relative certainties of established common law analogies too far in developing difficult constitutional doctrine is ever present and ever to be resisted". *Cooper v. United States*, 594 F.2d 12, 17 (4th Cir. 1979). See also, *Brewer v. Williams*, 430 U.S. 387, 401 N. 8 (1977); *Stoner v. California*, 376 U.S. 483, 488 (1964). *Silverman v. United States*, 365 U.S. 505, 513 (1961); and *Jones v. United States*, 362 U.S. 257, 266 (1960).

The *Cooper* court itself felt that the substantive due process right to fairness in the plea bargaining process was "too plain to require discussion". 594 F.2d at 18. The reason for this obviousness inheres in the constitutional nature of plea bargaining, as defined in *Santobello*, and in the vulnerable position in which a defendant finds himself once plea negotiations begin and he is at the whim of the prosecutor.

The application of fairness/due process concepts emanates from notions of human dignity, which require special treatment for human persons - - even criminal defendants. The preference for due process over contract in *Cooper* recognizes that human dignity is compromised when, at any stage of criminal proceedings, one's rights are relegated exclusively to contract theory. In plea bargaining it is liberty that is being negotiated, not goods and services. *Cooper* merely says that the constitutional mandate of fairness requires that plea offers be respectful of human dignity, and be made with the utmost of care, and must remain binding but for the most compelling of reasons.

Though this court has never faced this particular question its view of fundamental fairness is well stated and protected in the *Cooper* analysis, and consequently, ignored by the rulings below. But even more important is the reasonable and persuasive analysis that the *Cooper* court urges as a basis for establishing fundamental fairness in this context.

> In so holding, we emphasize those factual elements most crucial to our finding of right and violation in order to confine our holding as narrowly as we may for decision. Here the proposal was specific and unambiguous in form, and was made without any reservation related to a superior's approval or otherwise; its content was reasonable in con-

text; it was made by a prosecutor with apparent (and probably actual) authority at the time; it was communicated promptly to the defendant so that no question of staleness was involved; the defendant assented promptly and unequivocally to its terms, indicated his assent to his counsel, and was entitled so far as the record shows to assume that its communication to the government would consummate the plea agreement; defense counsel did in fact within a matter of a few hours communicate defendant's acceptance to the government, by sheer fortuity being told of the government's "withdrawal" before he could vocalize his client's "acceptance"; and finally, the reason for the attempted withdrawal had nothing to do with extenuating circumstances affecting the government's or any public interest that were unknown when the proposal was extended, but lay simply in a superior's second-guessing of a subordinate's judgment. When, as here, such a proposal - - specific, unambiguous and not unreasonable on its face - - is offered by the government to a defendant through his counsel, constitutional fairness requires that it be fulfilled if within a reasonable time the defendant unequivocally communicates his assent to it, and unless in the interval extenuating circumstances affecting the propriety of the proposal that were unknown to and not reasonably discoverable by the government when the proposal was made have supervened or become known. This necessarily means that once presented, such a proposal may not be withdrawn in the face of proffered acceptance for no other

> reason than that a superior disagrees with an apparently authorized subordinate's judgment in making it. *Id.* at 19.

This analysis should be accepted by this Honorable Court, and if accepted, should require a reversal of the Louisiana Supreme Court ruling in that the instant facts would be shown to be extremely consistent with the *Cooper* facts.

B. The Rulings Below Conflict With The Decisions Of Other Federal and State Courts And A Determination By This Court Is Necessary To Insure Uniformity On This Important Constitutional Question.

The precise issue of this case is one that has received attention only since this Court's decision in *Santobello*, a relatively short time indeed. Consequently, not only has this Court not spoken to the issue, but neither have many other courts. Yet, among those whom have spoken there is great conflict and confusion, which cries out for uniformity.

Cooper, supra is of course the leading Federal circuit case on the subject. The Fourth Circuit has recently reaffirmed *Cooper in United States v. Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1980) and *United States v. McIntosh*, 612 F.2d 835 (4th Cir. 1979).

In *McIntosh* Judge Phillips elaborated upon the *Cooper* rationale in his concurrence:

> "Specifically, we held [in *Cooper*] that while constitutional right would ordinarily be found to have arisen at any point where right measured by contract law would be found, it might arise earlier. Without attempting a general definition of the point short of contract right where constitutional right arose,

> we held on the specific facts of that case such a right had arisen and must be enforced.
>
> . . . .
>
> Underlying and giving content to the constitutional right defined and enforced in *Cooper* are expectations reasonably induced by government that its proposals respecting the liberty of persons accused of a crime will be honored. 612 F.2d at 838 (Phillips, J., concurring).

On the other hand one Federal Circuit has rejected *Cooper* in *Gov't. of Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir. 1980). The Ninth Circuit has on two occasions specifically left open the question: *United States v. Scheufler*, 599 F.2d 893 (9th Cir. 1979) and *United States v. Herrera*, 640 F.2d 958 (9th Cir. 1981). The Tenth Circuit has on one occasion cited *Cooper* approvingly. *See United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981).

The confusion and conflict that has plagued the circuits on this question has been reflected in the lower federal courts, and the various state courts. However, despite the fact that two other courts have specifically left open the question, *See Gold v. Booth*, 433 N.Y.S.2d 879 (App.Div. 1980). and *United States v. Kazena*, 11 M. J. 28 (C. M. A. 1981), most courts have viewed *Cooper* as an all or nothing proposition. This has resulted in either total acceptance or total rejection of the constitutional analysis of *Cooper*. Those rejecting *Cooper* include, *People v. Barnett*, 170 Cal. Rptr. 255 (App. 1981); *State v. Wheeler*, 631 P.2d 376 (Wash. 1981); *State v. Collins*, 265 S.E.2d 172 (N.C. 1980); *State v. Beckes*, 300 N.W.2d 871 (Wis.App. 1980); *State v. Collins*, 260 S.E.2d 650 (N.C.App. 1979) and *State v. Ed-*

wards, 279 N.W.2d 9 (Iowa 1979).

Those cases or opinions following *Cooper* include, in addition to the Fourth Circuit cases, *State v. Johnson*, 596 P.2d 308 (Wash.App. 1979); *Comm. of Pennsylvania v. Klobuchir*, 405 A.2d 881 (Penn. 1979) (Opinion of three justices for an equally divided court); *Bullock v. State*, 397 N.E. 2d 310 (Ind. 1979) (Shields, J., dissenting). Additionally, a number of courts have cited *Cooper* approvingly. *See United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981); *Commonwealth v. Smith*, 427 N.E. 2d 739 (Mass. 1981) (partially approving of *Cooper*); *People v. Ferguson*, 413 N.E. 2d 135 (Ill. App. 1980); *Turner v. Fair*, 476 F. Supp. 874 (D. Mass. 1979); *Bush v. United States*, 473 F. Supp. 715 (E. D. Penn. 1979); and *State v. Nall*, 379 So.2d 731 (La. 1980) (Dennis J., concurring).

Given this extreme confusion and rampant conflict over whether or not a constitutional right exists under the instant circumstances this case merits certiorari consistent with this court's rules. *See* Supreme Court Rules, Rule 17(A) (B) & (C).

C. The Louisiana Supreme Court Misapplied The Fundamental Fairness Test By Refusing Petitioner's Motion to Quash.

The Louisiana Supreme Court failed to specify clearly the basis for its holding. It cited its earlier discussion of plea bargains in *State v. Nall*, 379 So.2d 731 (La. 1980) in which the majority opinion analyzed the case under principles of the Louisiana Civil Code law of obligation (contracts). The court admitted that *Nall* contained a concurrence by Justice Dennis wherein he articulated the view that the case should have turned upon constitutional principles as discussed in *Cooper*. Specifically, Justice Dennis said that he was "troubled by the [majority] opinion's *failure to analyze the case*

in any light other than contract law". Id. at 734 (emphasis added). 1/

Yet, the opinion below says of *Nall* that it does not "[reveal] any real difference of opinion among the members of this court on this point". *State v. Caminita,* No. 81-KA-1940, slip opinion at 5 (March 1, 1982). Furthermore, the court felt that "Justice Dennis' concurrence merely points up what is implicit in the majority opinion, that the traditional law of contracts guides educated expectations of fairness in any negotiation and can be a useful analogy in weighing claims of denial of due process in plea negotiations." *Id.* It is difficult to accept this conclusion when the language of *Nall,* and Justice Dennis' concurrence make it impossible to find an implicit recognition of the appropriate consitutional analysis by the majority.

Moreover, a careful reading of the opinion below discloses an uncertainty of analysis. At one point the opinion affirms the lower court because there was no "deterimental reliance". *Id.* at 4. Then later in the opinion the court seems to apply the "fairness" reasoning of *Cooper* while specifically rejecting the *Cooper* rationale. After a mix of contract and constitutional language the court concludes: "This is not enough to render the proceedings unconstitutionally unfair". *Id.* at 6.

It is submitted that such a case should be assessed in clear constitutional terms, *Santobello v. New York,* 404 U.S. 257 (1971); *Cooper v. United States,* 594 F.2d 12 (4th Cir. 1979), and that under that analysis more careful attention is owed the question of fairness than is given by

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1/ Justice Dennis did not take part in the instant case because the Louisiana Supreme Court was in the process of using rotating ad hoc Judtices, three of whom participated in this case.

the court below.

The error of analysis emanates from the Louisiana courts's narrow, and now antiquated definition of fairness: "But the real question is whether Ronald Caminita has been dealt with in a manner so fundamentally unfair that it shocks the (judicial) conscience". *State v. Caminita, supra,* at 5. Professor Tribe has aptly described the evolution of this test into its present form:

> The earliest methods used by the court to determine the required form of procedural due process involved reference to natural law. Later, ideas of "conventional morality" or notions of what has historically seemed "fair and right and just" were at the root of the selection of procedures. Although "a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process", overtly utilitarian interest-balancing has come to play a predominant role only in recent years. L. Tribe, AMERICAN CONSTITUTIONAL LAW 539–40 (1978). *See also, Board of Regents v. Roth,* 408 U.S. 465 (1972).

It is this failure to balance the harm to petitioner, caused by prosecutorial caprice, against any burdens to the government, which fatally flaws the Louisiana courts determination that no constitutional violation has occurred. Such a balance was required by *Cooper* and, as the Louisiana Supreme Court notes, *Cooper* involved "very similar facts". On those "very similar facts" the *Cooper* court, on balance, protected the criminal defendant, but the Louisiana court's conscience was not shocked. This Court should declare who is right.

II. The Ruling Below Conflicts With Important Sixth Amendment Rights Concerning Effective Assistance Of Counsel Previously Articulated By This Court And Other Lower Courts.

Petitioner also asserts that the "breached" plea agreement implicates important Sixth Amendment rights in that the lawyer-client relationship is largely dependent upon the client's trust in his attorney. That trust is destroyed when his attorney communicates plea offers that are subsequently and mysteriously not honored. This concern was prominent in the reasoning of *Cooper v. United States*, 594 F.2d 12 (1979), but completely ignored by the Louisiana Supreme Court despite the fact that the argument was made to them in petitioner's appellate brief.

Cooper rested heavily upon the Sixth Amendment. In fact, *Cooper* held that the fairness argument, *supra*, was "too plain to require discussion". *Id.* at 18. Consequently, virtually all of *Cooper's* constitutional analysis was of the Sixth Amendment component.

> Because prosecutors are required to conduct plea negotiations through defense counsel, the government's position and communications in plea discussions are necessarily mediated to defendant through his counsel. (Citations omitted). For this reason, not only the credit and integrity of the government but those of his counsel are involved in a defendant's perception of the process. *Id.* at 18.

The court went on to conclude that:

> To the extent that the government attempts through defendant's counsel to change or

> retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas. *Id.* at 18–19.

Cooper's holding is buttressed by similar reasoning of this Court, as in *Brewer v. Williams*, 430 U.S. 387 (1977). Most helpful is Mr. Justice Stevens' concurrence:

> At this stage [custodial interrogation of a defendant] - - as in countless others in which the law profoundly affects the life of an individual - - the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise [that interrogation would not take place in counsel's absence] to [defendant's] lawyer. *Id.* at 18.

By completely ignoring this issue the lower court has not given petitioner a full hearing on his important Sixth Amendment rights.

B. The Ruling Below Conflicts With Decisions Of Other Federal And State Courts And A Determination By This Court Is Necessary To Insure Uniformity On This Important Constitutional Issue.

While not all courts that have addressed *Cooper* have considered the Sixth Amendment question those that have disagree. Most important, however, is that the Fourth Circuit in reaffirming *Cooper* has attached even greater emphasis to the Sixth Amendment component. In *United States v. McIntosh*, 612 F.2d 835 (4th Cir. 1979), the court emphasized:

> Where, such as in *Cooper*, some technical rule works directly to impair a defendant's personal acceptance of an offer and deny a substantial right such as effective assistance of counsel, we will distinguish the application of such rules to the facts before us. *Id.* at 837.

Government of Virgin Islands v. Scotland, 614 F.2d 360 (3rd Cir. 1980) is an example of those cases rejecting the Sixth Amendment argument.

These cases represent well the conflict and confusion on this important constitutional issue. In order to avoid further confusion, and in order to guide lower courts, and in order to achieve uniformity this Court should grant plaintiff's petition consistent with Rule 17.

C. The Louisiana Supreme Court Failed To Apply The Appropriate Sixth Amendment Test In Deciding Whether To Grant Petitioner's Motion To Quash.

Indeed, little need be said on this point. Simply put, petitioner argued the Sixth Amendment issue to the Louisiana Supreme Court; *Cooper* rested heavily upon it, and yet the Louisiana court never mentioned it. Petitioner now asserts that he was deprived of the protection of this important determination by the court below. Furthermore, petitioner avers that the issue raised by this case cannot be and was not fully adjudicated since the Sixth Amendment argument is indispensable to a full constitutional analysis, and would be an independent basis for granting petitioner's motion to quash. As it is, petitioner has had only half of his pertinent constitutional rights adjudicated by the courts below.

CONCLUSION

Petitioner has been denied his due process right to fundamental fairness, defined according to the appropriate balancing of interests, and his Sixth Amendment rights by having his confidence and trust in his lawyer damaged by the prosecutor's whim in not honoring a plea agreement made by one with authority to do so.

Because serious constitutional rights are implicated in this case, and because the federal circuits and states are in hopeless conflict on this point petitioner prays that this Court grant his petition for certiorari.

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondent this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

D.A. Office of Orleans Parish,
State of Louisiana
619 South White Street
New Orleans, Louisiana 70119

Frank J. Uddo m.m.s.
FRANK J. UDDO

DATED June 4, 1981.